

**BOARD OF APPEALS
FOR
MONTGOMERY COUNTY**

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Case No. S-2554

PETITION OF J. KIRBY DEVELOPMENT, LLC

OPINION OF THE BOARD
(Hearing held March 5, 2003)
(Effective date of Opinion: May 28, 2003)

Case No. S-2554 is a petition pursuant to Section 59-G-2.35 of the Zoning Ordinance (Chapter 59, Montgomery County Code 1994, as amended) for a special exception to construct senior adult housing at 601 East Randolph Road, Silver Spring, Maryland.

A public hearing was held on Wednesday, March 5, 2003, pursuant to Section 59-A-4.11(a) of the Zoning Ordinance. Appearing on behalf of the Petitioner were Scott C. Wallace, Esquire; Scott Wolford, Land Planner; Logan Schutz, Architect; John Clapsaddle, Civil Engineer; Edward Papazian, Transportation Engineer; and, Jeff Kirby on behalf of the Petitioner.

Robert Yeck appeared on behalf of the Greater Colesville Civic Association ("GCCA"). Several residents from the neighborhood testified in opposition to the Special Exception, including Elizabeth Hill, Mary Owens, Ida Jenkins, William Mosby, Alfred Schwartz and Paula Jean Hallberg.

Martin Klauber, the People's Counsel of Montgomery County, Maryland, also participated in the proceedings. Mr. Klauber recommended that Board approve the Special Exception and Parking Waiver, subject to the conditions enumerated below.

Decision of the Board:

Special Exception granted, subject
to conditions enumerated below.

EVIDENCE PRESENTED TO THE BOARD

1. The subject property is located at 601 East Randolph Road, Silver Spring, Maryland and is zoned R-90. The Property is located on the south side of East Randolph Road, approximately 1000 feet east of the intersection of New Hampshire Avenue and East Randolph Road, and approximately 200 feet west of the intersection of East Randolph Road and Fairland Road (Ex. 17(c)). It is irregular in shape and has approximately 600 feet of frontage along East Randolph Road. The Property is unimproved. A Class III perennial stream runs along the western edge of the Property. The stream valley on the property contains approximately 2.3 acres. The Petitioner is the contract purchaser of the Property (Ex. 13).

2. The land adjacent to the south, east and west of the Property is zoned R-90 and is developed as a single-family detached residential community with lots ranging from 1/3 acre to 1 acre in size (Ex. 17(c)). The houses to the south and west of the Property, across the stream and stream valley on the Property, are generally set back between 60-100 feet from the western property line. The land to the north of the Property, across East Randolph Road, is zoned RE-1 and is developed with single-family residences on predominately 1/4 acre lots (Ex. 17(c)). The two houses directly across East Randolph Road from the Property are set back between 140 feet and 180 feet from the northern edge of the Property.

3. The former Smithfield School is immediately adjacent to the Property to the east. This site is improved with two small buildings and was most recently used as a County bus maintenance and storage yard. In recognition of the former use of this site as a school for African-Americans during the "Jim Crow" era, the School is designated as Historic Site #33/24 on the Montgomery County Master Plan for Historic Preservation. A chain link fence on the Property runs along the common property line between the Property and the Smithfield School site.

4. Approximately 1,000 feet to the west of the Property, at the intersection of New Hampshire Avenue and East Randolph Road, is a commercial area predominantly zoned C-1 that serves the surrounding community (Ex. 17(c)). The Colesville Center shopping area contains many different retail, service, and office uses, including restaurants, gas stations, medical offices, and grocery stores and some special exception uses.

5. The Petitioner proposes to construct 83 one and two-bedroom apartment units for independent seniors, 62 years of age or older, in one building with associated surface parking on the Property (the "Project") (Ex. 41(b)). There will be 23 1-bedroom units and 60 2-bedroom units. All of the apartments will have a living room, dining room, and a full service kitchen with all appliances included and will be serviced by individual heat and air conditioning systems. The one-bedroom apartments will contain approximately 650 square feet of living area and one bathroom. The two-bedroom apartments will contain from

approximately 880 to 1,050 square feet of living space and two bathrooms. The units will be serviced by two elevators.

6. Mr. Jeff Kirby testified that 66 of the 83 units (80%) will be available to households with incomes at or below 60% of the area median income levels for Montgomery County, and about 17 of the 83 units (20%) will be available to households with incomes at or below 40% of the area median income for Montgomery County. All of the apartments will qualify as Moderately Priced Dwelling Units ("MPDUs") pursuant to Chapter 25A of the Montgomery County Code (the "MPDU Law"). Mr. Kirby testified that the rents based on current regulations would range from \$693 to \$1,030 (Ex. 40).

7. Mr. Kirby testified that the proposed building will also include amenities, at the terrace and first levels, that include a library, internet/computer center, health suite for wellness check-ups and visiting doctors, exercise and aerobic room, large multipurpose rooms, salon, media/theatre room, game room, arts & crafts room, hospitality suite for visitors and central laundry. In addition, there will be off-site transportation service three times per week. [See Revised Transportation and Parking Management Plan, Exhibit No. 41(e)]. No central dining service will be provided for residents.

8. Mr. Scott Wolford testified that the proposed building and asphalt surface parking area are located on the northern and eastern portions of the Property and are oriented toward East Randolph Road. The siting of the building and surface parking area at the front of the Property allows a 150-foot buffer to be maintained along the entire stream valley on the Property.

9. Mr. Logan Schutz testified that the proposed building will be 35 feet in height, three stories in front with a terrace level in back (Ex. 5(d)). The proposed building consists of two short wings joined by a central lobby in a "J" shape.

10. Mr. Schutz also testified that the exterior of the proposed building will be constructed with maintenance-free brick and vinyl siding to create an attractive visual appearance, which is residential in character along East Randolph Road. Mr. Schutz stated that the proposed building incorporates an articulated façade, gabled roof peaks, and other design elements such as a front porch, to make the scale and height of the proposed building compatible with the surrounding homes. Mr. Schutz also testified that the proposed facility would have residential window treatments. The proposed building's windows will incorporate materials to ensure adequate noise reduction. A large canopy feature is proposed over the main entrance to the building and outdoor furniture will be provided for a seating area. Outdoor amenities also include a patio with outdoor furniture in the rear of the building facing the stream and stream valley. The area around the patio will be landscaped (Ex. 41(c)).

11. Mr. Wolford testified that a loading dock for move-ins and move-outs will be located adjacent to the “east wing.” The loading dock will be screened with a fence enclosure and will not be visible from East Randolph Road. A trash compactor is proposed to be located inside the section of the east wing that is adjacent to the loading area. Small dumpsters will be stored inside this area of the east wing and brought outside on trash pick-up days.

12. Mr. Wolford also testified that the parking area is accessed from a right-in/right-out driveway with two 10-foot wide lanes onto East Randolph Road. The parking area will be lighted with residential style pole fixtures that will incorporate directional cut-offs to ensure no spillover of light or glare onto adjacent properties while maintaining safe illumination (Ex. 8). A landscaped berm approximately 6 feet in height is proposed along East Randolph Road in front of the parking area to minimize the visual impact of the parking area from houses located across Randolph Road from the Property (Ex. 41(c)).

13. Mr. Edward Papazian testified that the Property is in the North Central Area of the County for purposes of determining parking requirements. For projects in the North Central Area, Section 59-E-3.7 of the Zoning Ordinance requires .85 spaces for each 1-bedroom unit and 1.15 spaces for each unit with 2 or more bedrooms. The Project proposes 23 1-bedroom units, which would require 20 spaces, and 60 2-bedroom units, which would require 69 spaces, for a total parking requirement of 89 spaces, less applicable credits. Section 59-E-3.33 (b)(3) of the Zoning Ordinance provides that credits for up to 20% of the required number of spaces may be given for projects that provide housing that meets the income limits of the MPDU Law. All of the units in this project are proposed MPDUs. The Petitioner will seek credits for 20% of the required 89 spaces (or 17 spaces) from the Montgomery County Planning Board (the “Planning Board”) at the time of Site Plan review pursuant to Section 59-E-3.33(b) of the Zoning Ordinance. The Petitioner has requested, in the Parking Waiver included with the Special Exception application (Ex. 3), a waiver for 28 of the remaining required 72 spaces. The proposed Site Plan shows 44 parking spaces. (Ex. 41(b)), reflecting an overall waiver of 45 spaces.

14. Mr. Papazian testified that the number of spaces provided is adequate for the proposed use based on analysis of parking demand data collected from two senior adult facilities, one known as Randolph Village located approximately 2 miles west of the Property on Randolph Road and the other known as Rainier Village located in Mount Rainier, Prince George’s County, approximately 10 miles southeast from the Property (Ex. 16(b)). Mr. Papazian testified that the parking demand at these two facilities ranged from .39 spaces per unit to .57 spaces per unit and that an average parking demand for senior adult housing of .48 spaces per unit was supported by this data. Mr. Papazian concluded that the parking proposed in the Special Exception at .53 spaces per unit was more than adequate to provide for anticipated demand. Mr. Papazian, testifying in support of the Special Exception and Parking Waiver, stated that the Project was well-

served by public transportation, with bus stops serviced by Ride-On and Metro routes located within 200 feet of the Property, and had convenient access to the nearby Colesville commercial center.

15. In response to questions from the People's Counsel and members of the Board regarding the comparability to the Project to the two facilities studied in the Parking Analysis, Mr. Papazian testified that the other facilities were chosen to be included in the parking analysis because they shared similar characteristics with the proposed use in terms of location, access to public transportation and off-site amenities.

16. Mr. Kirby also testified that both Randolph Village and Rainier Manor had residents with similar ages and income levels as projected for the Project and have similar staffing levels as are proposed for the Project.

17. Mr. Papazian and Mr. Kirby also testified that, unlike this requested Special Exception, the comparison facilities did not employ a TPMP. Mr. Papazian testified that the results of the parking analysis were accepted by the Transportation Planning Division Staff (Ex. 33), and the Department of Permitting Services (Ex. 31(a)).

18. Mr. Papazian testified that the proposed parking facility, including the proposed driveway, was safe and adequate for vehicular and pedestrian circulation. Mr. Papazian also testified, in response to questions from residents in the vicinity of the Property, that turning movements into and out of the Project would be safe, including traveling east out of the Project to make a U-turn at the Fairland Road/East Randolph Road intersection in order to travel westbound on East Randolph Road.

19. The Property is not recorded by plat of subdivision (Ex. 4). Mr. Papazian testified that the use will require approval of a preliminary plan of subdivision by the Planning Board to conform to Chapter 50 of the Montgomery County Code. Mr. Papazian also testified that the Project generates 3 morning peak hour trips and 5 evening peak hour trips and will satisfy all applicable Adequate Public Facilities Ordinance requirements at the time of preliminary plan review.

20. Mr. Kirby also testified that in his experience developing and managing senior housing facilities, auto ownership was significantly less than one per unit.

21. Mr. Schultz testified that two brick faced monument signs are proposed at the driveway entrance and will conform to the requirements of Article 59-F of the Montgomery County Code (the "Sign Ordinance") (Ex. 41(b)).

22. Mr. Kirby further testified that the Project will be professionally managed by a property management company, with on-site offices, that is a related entity to the Petitioner with experience managing senior adult facilities (Ex. 3). The Project will be staffed with a full time manger and a full-time resident services

coordinator, who will plan and coordinate social activities and services for the residents. A member of the staff will live in the building. A non-resident staff member will work an eight-hour shift, 5 days a week. A porter and maintenance person will be employed part-time including weekends. Other persons who may periodically visit the Project include health care professionals, a beautician/hairdresser or barber, and instructors for social and recreational activities.

23. Mr. Kirby further testified that landscape and trash disposal services will be contracted out. Except for parcel and mail service, there will be no regularly scheduled deliveries to the Property (Ex. 3).

24. Mr. Kirby described his discussions with representatives and membership of GCCA. Mr. Kirby stated that, with the assistance of the People's Counsel, he and GCCA agreed to a Traffic and Parking Management Plan ("TPMP") (Ex. 41(e)), which is designed to ensure the adequacy of on-site parking for residents and visitors to the proposed facility and discourage any off-site parking by visitors to the Property. Mr. Kirby also explained the TPMP provides the Petitioner will install a fence from the terminus of the existing fence on the Property abutting the Smithfield School site to the edge of the stream valley buffer adjacent to Lot 1, Block B, Colesville Gardens subdivision (Ex. 41(b)).

25. Mr. Robert Yeck testified that the GCCA supports the Special Exception with conditions that off-site parking be avoided. Mr. Yeck also testified that GCCA met with Mr. Kirby to develop the TPMP and that GCCA's support of the Special Exception is based on the Special Exception and Parking Waiver being conditioned on the Petitioner agreeing to the TPMP.

26. Mr. Joel Gallihue of the Maryland National Capital Park and Planning Commission's (MNCPPC) Technical Staff testified that Staff recommends approval of the Special Exception because the proposed use conforms to the recommendations of the 1997 Approved and Adopted White Oak Master Plan (the "Master Plan") at page 18 for providing affordable senior housing in locations served by public transportation and close to commercial amenities. Mr. Gallihue also testified that the Special Exception meets the general and specific requirements for approval of special exceptions for senior adult housing.

27. Mr. Gallihue further testified that the Special Exception proposes .53 parking spaces per unit, which is adequate based on the nature of the use and the analysis performed by the Petitioner's traffic engineer of two other senior adult housing projects in the greater Washington, D.C. area that showed that the average parking demand of such uses was .48 spaces per unit. Mr. Gallihue added that Staff supported the Parking Waiver. In response to a question from Mr. Yeck, Mr. Gallihue stated that because of the requirements of County law to preserve the 150 foot wide stream valley buffer in the rear of the Property, the Petitioner was unable to locate additional parking spaces on the Property.

28. The Montgomery County Planning Board adopted the Staff's recommended approval of the Special Exception and Parking Waiver, subject to conditions (Ex. 32).

29. Mr. Wolford testified that the Project incorporates the drop in elevation from East Randolph Road and uses a landscaped berm to screen the parking area and proposed building and minimizes the overall impact of the Project from the houses across East Randolph Road. Mr. Wolford also testified that the Project will be developed under the R-90/MPDU method of development (Section 54-C-1.62 of the Zoning Ordinance) and complies with all applicable height and setback requirements of the R-90/MPDU method of development (Ex. 41(b)).

30. Mr. Wolford added that 79% of the Property will be maintained as greenspace. He also described the additional landscaping and planting that the Petitioner would undertake on the Property to create an attractive setting and provide buffers from surrounding uses (Ex. 41(c)).

31. Mr. Wolford also testified that by providing MPDUs for senior adults, the Special Exception complies with the recommendations at Pages 18 and 66 of the Master Plan to increase the variety of housing options for seniors in the White Oak Planning Area through special exceptions at locations well served by public transportation, shopping and community facilities (Ex. 14).

32. Mr. Wolford further testified that the Project is consistent with recommendation at Page 24 of the Master Plan that special exceptions be compatible with existing residential neighborhoods. In particular, Mr. Wolford testified that the proposed building will meet all applicable setbacks requirements and, in fact, will be sited on the Property to provide significantly greater setbacks for the eastern and southern property lines than are required (Ex. 14).

33. Mr. John Clapsaddle stated that the Petitioner's Stormwater Management Concept Plan includes underground facilities, which will manage the quantity of stormwater flow (Ex. 11). Mr. Clapsaddle also testified that the Stormwater Management Plan met all applicable state and county requirements. In response to questions from nearby residents, Mr. Clapsaddle stated that the Stormwater Management Concept Plan provides a "non-erosive velocity" outfall that is designed to eliminate erosion caused by the stormwater flow from the outfall into the stream channel on the Property.

34. Mr. Clapsaddle testified that the public sewer and water systems are adequate for the proposed use. Mr. Clapsaddle also testified that the proposed driveways had adequate site distance for vehicles exiting and entering the Property.

35. As stated in Mr. Clapsaddle's Civil and Environmental Engineering Report (Ex. 15), the Property is located in the Hollywood Branch subwatershed of the Paint Branch watershed. The Countywide Stream Protection Strategy assesses

the Hollywood Branch subwatershed as having good stream conditions and habitat conditions, labeling it as a Watershed Protection Area – Remedial Level (Ex. 33).

36. Several residents from the neighborhood testified in opposition to the Special Exception. Elizabeth Hill testified regarding her concern over possible improvements to Anderson Street, and the adequacy of fire protection for the Project. Mary Owens testified regarding the safety of vehicles exiting the Project and making a u-turn at Fairland Road to travel westbound on East Randolph Road. Ms. Owens also testified that she believed the Project would have a negative impact on the value of her home. Ida Jenkins testified regarding the adequacy of public sewer service for the Project. William Mosby testified regarding his concern over increased erosion in the stream valley on the Property caused by stormwater run-off from the Project. Alfred Schwartz testified that he was concerned over egress from the Project onto East Randolph Road. Paula Jean Hallberg testified that she felt there was not enough parking for the Project and that she was concerned over the additional traffic from the Project. The Petitioner's witnesses offered response to the issues raised by the residents that were within the scope of the Special Exception.

37. At the Board's request, the Petitioner revised the Site Plan, Landscape Plan, Lighting Plan and Transportation and Parking Management Plan to reflect the conditions of approval in the Board's opinion. These were submitted with a letter from Mr. Wallace, dated April 4, 2003. The Board re-opened the record to accept the revised exhibits at a worksession on May 21, 2003, they are entered into the record as Exhibit Numbers 41 (a)–(e).

FINDINGS OF THE BOARD

Based on the Petitioner's oral testimony, the evidence of record and the exhibits presented at the public hearing, the Board concludes that the Special Exception and the Parking Waiver can be granted.

Section 59-G-1.2 Conditions for Granting.

59-G-1.21 Standard for evaluation. A special exception must not be granted without the findings required by this Article. In making these findings, the Board of Appeals, Hearing Examiner, or District Council, as the case may be, must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of the adverse effects the use might have if established elsewhere in the zone. Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site. Non-inherent adverse effects, alone or in conjunction with inherent adverse effects, are a sufficient basis to deny a special exception.

The Board finds that the inherent adverse characteristics of the proposed senior adult housing facility are the size and scale of the proposed building, the amount of impervious surface for driveways and parking areas, and its effects on stormwater management, lighting, and signage. The Board finds that the above-referenced physical and operational characteristics of the proposed use, including recreational and educational activities and transportation service, are no different than what is normally associated with senior adult housing facilities. Concerning the requested Special Exception petition, the Board finds that the building and parking lot have been sited on the northern and eastern portions of the Property, thereby retaining all of the existing stream valley buffer and significant existing forest to provide a natural buffer between the proposed building and the adjacent community. The Board also finds that the layout of the Project on the Property and building design minimizes the scale and bulk of the building. Given the submitted plans, and the Petitioner's Statement of Operations (Ex. 3) and other submitted documentation, the Board does not find any non-inherent effects related to this Special Exception.

Section 59-G-1.21 General Conditions.

- (a) *A special exception may be granted when the Board ... finds from a preponderance of the evidence of record that the proposed use:*
 - (1) *Is a permissible special exception in the zone.*

The Board finds that the proposed senior adult housing is allowed in the R-90 Zone, in accordance with Section 59-C-1.31 of the Zoning Ordinance.

- (2) *Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a*

proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

The Board finds that the proposed special exception satisfies the standards and requirements for senior adult housing, as discussed below, in accordance with Section 59-G-1.21(a)(2) of the Zoning Ordinance.

- (3) *Will be consistent with the general plan for the physical development of the district, including any master plan or portion thereof adopted by the commission. Any decision to grant or deny the special exception must be consistent with a recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that the granting of a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

The Board finds that the 1997 Approved and Adopted White Oak Master Plan recommends the existing R-90 zoning for the Property, and that senior adult housing is allowed by special exception in this zone in accordance with Section 59-G-1.21(a)(3) of the Zoning Ordinance. The Board finds that the Special Exception complies with the Master Plan recommendations to increase the variety of housing options in the Planning Area, and encourage housing for seniors at locations adequately served by public transportation, shopping and community facilities.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions and number of similar uses.*

The Board finds that the proposed building design and layout creates an appropriate scale given the topography and other characteristics of the Property. The Board also finds that the proposed use generates a minimal amount of traffic and provides safe and adequate areas for parking and circulation. Accordingly, the Board finds that the proposed use harmonizes with the surrounding uses and

is compatible with the surrounding neighborhood in accordance with Section 59-G-1.21(a)(4) of the Zoning Ordinance.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood; at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The Board finds that the Special Exception will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood, in accordance with Section 59-G-1.21(a)(5) of the Zoning Ordinance.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The Board finds that the proposed use generates minimal on-site activities and such activity is residential in nature. The Board also finds that the proposed lighting will provide illumination sufficient for safety and operational purposes, but without causing any glare to encroach on adjacent properties. The Board finds therefore that the Project will not generate vibrations, fumes, odors or dust and will not cause any objectionable noise, illumination, glare or physical activity, in accordance with Section 59-G-1.21(a)(6) of the Zoning Ordinance.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in the neighboring one-family residential area, increase the number, intensity or scope of special exception uses sufficiently to affect the area adversely or alter its predominantly residential nature. Special exception uses in accord with the recommendation of a master or sector plan are deemed not to alter the nature of an area.*

The Board finds that the proposed use will not, when evaluated in conjunction with existing and approved special exceptions in the neighboring one-family residential area, increase the number, intensity or scope of special exception uses sufficiently to affect the area adversely or alter its predominantly residential nature, in accordance with Section 59-G-1.21(a)(7) of the Zoning Ordinance.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The Board finds that the proposed use will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area in accordance with Section 59-G-1.21(a)(8) of the Zoning Ordinance.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities. If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of granting the special exception.*
- (i) *If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.*

The Board finds that at the time of subdivision, the adequacy of public facilities will be addressed by the Planning Board.

- (ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will not reduce the safety of vehicular or pedestrian traffic.*

The Board finds that the proposed driveway will be adequately sized and designed to safely accommodate safe vehicular access to and from the Property. The Board therefore finds that the proposed use will not reduce the safety of vehicular or pedestrian traffic, in accordance with Section 59-G-1.21(a)(9) of the Zoning Ordinance.

Section 59-G-2.35 Housing and related facilities for senior adults and persons with disabilities.

A special exception may be granted for housing and related facilities for senior adults or persons with disabilities, subject to the following provisions:

(a) Prerequisites for granting

“(1) A minimum of 15 percent of the dwelling units is permanently reserved for households of very low income, or 20 percent for households of low income, or 30 percent for households of MPDU income. If units are reserved for households of more than one of the specific income levels, the minimum percentage must be determined by agreement with the Department of Housing and Community Affairs in accord with Executive regulations. Income levels are defined as follows:

- (A) “MPDU income” is the income limit determined by the Department of Housing and Community Affairs in the administration of the moderately priced dwelling unit (MPDU) program, as prescribed by Chapter 25A.*
- (B) “Low income” is income at or below 60 percent of the area median income adjusted for household size.*
- (C) “Very Low income” is income at or below 50 percent of the area median income adjusted for household size.*
- (D) “Area median income” is as determined annually by the U.S. Department of Housing and Urban Development.*

The Board finds that Petitioner's proposal to provide that 80% of the units will be permanently reserved for households that meet the definition of “low income” and 20% of the units will be reserved for households that meet the definition of “very low income”, means that all of the units will qualify as MPDUs.

- (2) The site or the proposed facility has adequate accessibility to or provides on site public transportation, medical service, shopping areas, recreational and other community services frequently desired by senior adults or persons with disabilities.*

The Board finds that the Property is adequately served by transportation, medical, commercial and recreational services including bus stops located within 200 feet of the Property. The Board also finds that with the provision of a shuttle bus three times a week by the Petitioner, residents of the proposed facility will have ample access to off-site facilities and services.

- (3) *The site or the proposed facility is reasonably well protected from excessive noise, air pollution, and other harmful physical influences.*

The Board finds that the proposed facility is reasonably well protected from excess noise, air pollution and other harmful physical influences. The proposed facility incorporates window materials and exterior wall construction to reduce interior noise levels required by County regulations. The Board also finds that the proposed berming and landscaping along the Property frontage will provide protection for the Project's residents from adverse impacts from East Randolph Road.

(b) Occupancy of a dwelling unit is restricted to the following:

- (1) *A senior adult or person with disabilities, as defined in Section 59-A-2.1;*
- (2) *The spouse of a senior or disabled resident, regardless of age or disability;*
- (3) *A resident care-giver, if needed to assist a senior or disabled resident; or*
- (4) *In a development designed primarily for persons with disabilities rather than senior adults, the parent, daughter, son, sister or brother of a handicapped resident, regardless of age or disability.*

Additional Occupancy Provisions are:

- (5) *Age restrictions must comply with at least one type of exemption for housing for older persons from familial status requirements of the federal "Fair Housing Act," Title VIII of the Civil Rights Act of 1968, and subsequent amendments thereto. (In that Act, "familial status" refers to discrimination against families with children.)*
- (6) *Resident staff necessary for operation of the facility are also allowed to live on site.*

The Board finds that, based on the Petitioner's testimony, the proposed facility will fully comply with the age-restriction residency requirements and that one resident staff member is proposed to live on the Property.

(c) Development standards other than density, in residential zones where allowed by special exception:

(1) *Minimum setbacks:*

- (A) *From street: 50 feet. Except for an access driveway, this must be maintained as green area. However, if development does not exceed the height limit of the applicable one-family zone, the minimum setback specified by the zone applies.*
- (B) *From side and rear lot lines: 25 feet or as specified by the relevant zone, whichever is greater.*

The Board finds that the proposed facility complies with standards of the R-90/MPDU method of development as provided for in Section 59-C-1.62 of the Zoning Ordinance for height and setbacks. The minimum setback from a street under the R-90/MPDU method of development is 25 feet; the proposed minimum building setback from East Randolph Road is 36 feet. The minimum side yard setback in the R-90/MPDU zone is less than 25 feet and, therefore, pursuant to Section 59-G-2.35(c)(1) above, the required side and rear setback is 25 feet; the proposed minimum side yard setback is 25 feet for the eastern side yard and 190 feet for the western side yard. The rear setback is over 275 feet, well in excess of the requirements.

- (2) *Maximum building height: four stories or the height of the applicable zone, whichever is less. Additional height up to six stories is permitted if the additional height is in conformity with the general character of the neighborhood considering population density, design, scale and bulk of the proposed building, traffic and parking conditions.*

The Board finds that the R-90/MPDU method of development permits a maximum building height of 40 feet (or three stories) and that the proposed building height is 35 feet.

- (3) *Maximum lot coverage: As specified by the relevant zone.*

The Board finds that the R-90/MPDU method of development does not provide a standard for maximum lot coverage. The R-90 Zone provides for a maximum building coverage of 30%. The proposed building will cover approximately 13.59% of the Property.

(4) *Minimum green area:*

(A) *R-60, R-90, and the RT Zones: 50 percent*

The Board finds that the required green area is 50% and that the proposed facility has a green area of 79.09%.

(d) *Development standards, other than density, in the R-30, R-20, R-10 and R-H Zones are as specified by the relevant zone in Section 59-C-2.41, except that the lot coverage and building setbacks may be modified as specified in Section 59-C-2.42 concerning standards for moderately priced dwelling units.*

The Board finds that this Section does not apply to this case.

(e) *Maximum density:*

In the Rural, Rural Cluster, RE-2, RE-2C, RE-1, R-200, R-150, R-90, R-60, R-40, RT-6, RT-8, RT-10, and RT-12.5 Zones, the number of units is governed by the overall size of the building as determined in accordance with the development standards by Paragraph (c) of this section. Minimum unit size is governed by the minimum space and other relevant standards of Chapter 26 title "Housing Standards," of this Code, as amended.

The Board finds that, as described in Evidence Presented paragraph 5 above, the units in the proposed facility will conform with the minimum standards for unit sizes as specified in Chapter 26-5 of the Montgomery County Code.

(f) *Parking and loading:*

Parking must be provided in accordance with the provisions of Section 59-E-3.7 and Section 59-E-2.83. The Board must require adequate scheduling and long-term continuation of any service for which parking credits are granted in accordance with Section 59-E-3.33 (b) and may require additional parking for any facilities and services provided in accordance with Paragraph (g)(2) of this section, if they serve nonresident senior adults or persons with disabilities. When considering the need for additional parking, the Board may consider the availability of nearby public or private parking facilities.

The Board finds that the Property is located in the North Central parking policy area pursuant to the Parking Ordinance. Pursuant to Section 59-E-3.7 of the Parking Ordinance, senior adult housing requires 0.85 spaces per 1 bedroom unit, and 1.15 spaces per 2 or more bedroom units and, therefore, the Project requires 89 parking spaces. The Petitioner is seeking credit for 20% of the required 89 parking spaces (or 17 spaces) as allowed under Section 59-E-3.33 of the Parking Ordinance where MPDUs are constructed, leaving a balance of 72 required spaces. The Petitioner proposes in the Special Exception to provide 44 parking spaces, therefore, seeks a waiver for the balance of the 72 required spaces, which is 28 spaces. The Board finds that with the grant of the applicable credits and requested additional Parking Waiver, including implementation of the TPMP, parking will be provided in accordance with the requirements of Section 59-E-3.7 and Section 59-E-2.83 of the Parking Ordinance.

(g) *Additional provisions:*

- (1) *One or more of the following ancillary facilities and services may be included to serve the residents and possibly nonresident senior adults or persons with disabilities. The Board may restrict the availability of such services to nonresidents and specify the manner in which this is publicized.*
 - (A) *Provisions for on-site meal service;*
 - (B) *Medical or therapy facilities or space for mobile medical or therapy services;*
 - (C) *Nursing care;*
 - (D) *Personal care services;*
 - (E) *Day care for senior adults or persons with disabilities;*
 - (F) *On-site facilities for recreation, hobbies or similar activities; or*
 - (G) *Transportation to such off-site facilities and services as shopping, religious, community or recreational facilities, or medical services.*

The Board finds that the Project will include facilities for medical services, recreational, and community services, all for the exclusive use of the residents. The Board also finds that the Petitioner will provide a transportation service three times a week for residents to off-site facilities and services and a once per month off-site trip for residents to regional amenities as determined to be appropriate by the Petitioner.

- (2) *Retail facilities may be included to serve exclusively the residents of the building.*

The Board finds that this subsection is not applicable.

- (3) *The application must contain a vicinity map showing major thoroughfares, public transportation routes and stops, and the location of commercial, medical and public services within a one-mile radius of the proposed facility.*

The Board finds that the Vicinity Map was included in the record of this Special Exception as Exhibit 17(c).

- (4) *Construction is subject to all applicable Federal, State and County licenses or certificates.*

The Board finds that based on the Petitioner's testimony, the Project will comply with all Federal, State and County applicable licenses or certificates.

Parking Waiver

Section 59-E-4.5 of the Zoning Ordinance provides that the Board may waive any requirements not necessary to accomplish any of the following objectives of Section 59-E-4.2 of the Zoning Ordinance:

1. *The protection of the health, safety and welfare of those who use any adjoining land or public road that abuts a parking facility. Such protection shall include, but shall not be limited to, the reasonable control of noise, glare or reflection from automobiles, automobile lights, parking lot lighting and automobile fumes by use of perimeter landscaping, planting, walls, fences or other natural features or improvements.*
2. *The safety of pedestrians and motorists within a parking facility.*
3. *The optimum safe circulation of traffic within the parking facility and the proper location of entrances and exist to public roads so as to reduce or prevent traffic congestion.*
4. *The provision of appropriate lighting, if the parking is to be used after dark.*

The Board finds that the requested waiver of 28 spaces will not impair any of these enumerated objectives. The Board finds that the Petitioner's Parking Analysis (Ex. 16(a)) demonstrates that the 89 parking spaces required under the Zoning Ordinance for the proposed use (which equals 1.07 spaces per unit)

exceeds the actual parking demand, which was determined in the Parking Analysis, through the examination of two similar facilities, to be .48 spaces per unit. The Board finds that the two senior adult housing facilities reviewed in the Parking Analysis are sufficiently similar in terms of location and the demographics of residents to provide a reasonable basis for determining the projected parking demand of the Project. The Board also finds that the results of the Parking Analysis were accepted by M-NCPPC Technical Staff and the Department of Permitting Services.

The Board finds that the proposed parking for the Project, including the waiver of 28 spaces, will provide .53 spaces per unit, which exceeds the average parking demand for senior adult housing shown in the Parking Analysis of .48 spaces per unit and is therefore adequate for the proposed use. The Board finds that Petitioner's TPMP, including the increase in the off-site transportation service to three times per week and the provision of an additional monthly off-site trip to regional amenities and attractions as determined appropriate by the Applicant, supports the reduction in the required number of parking spaces required in the Parking Waiver. The Board finds that the TPMP, including the proposed fence along the western property line, will ensure all residents and employees will park on the Property and will discourage visitors to the Property from parking in the surrounding community. The Board finds that the parking areas proposed in the Special Exception will be adequately lighted and safe for pedestrian and vehicular circulation.

Therefore, based on the evidence and testimony of record, the Board GRANTS the requested Waiver from the requirements of Article 59-E.

Further, based on the foregoing, the Board GRANTS this Special Exception subject to the following conditions:

1. The Petitioner is bound by its testimony and exhibits of record, the testimony of its witnesses and representations of its attorney, to the extent that such evidence and representations are identified in this opinion.
2. Approval of Final Forest Conservation Plan prior to release of sediment and erosion control or building permit. Prior to site plan signature set, approval of Reforestation Plan for all unforested portions of the stream buffer (-11,000± square feet) in compensation for loss of priority forest and encroachment at the edge of the stream buffer (currently -750± square feet).
3. Compliance with Department of Permitting Services requirements for stormwater management.
4. Conformance with Chapter 50 (Subdivision Regulations) of the Montgomery County Code. Approval of a Preliminary Plan of subdivision is required by the Montgomery County Planning Board, prior to the issuance of any building permits.

5. Exterior wall construction to maintain interior noise levels in compliance with the requirements of Montgomery County.
6. Petitioner to amend the TPMP (Ex. 41(e)) to provide transportation service three times a week to nearby medical services, shopping areas, recreational and community services and to provide transportation once per month for residents to regional amenities as determined to be appropriate by the Petitioner.
7. Petitioner must abide by all of the provisions of the TPMP.
8. Petitioner to obtain necessary licenses and certificates to operate the proposed facility prior to commencing operation.

On a motion by Louise L. Mayer, seconded by Allison Ishihara Fultz, with Angelo M. Caputo and Donna L. Barron, Vice-Chairman in agreement, and Donald H. Spence, Jr., Chairman necessarily absent, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled case.

Donna L. Barron
Vice-Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 28th day of May, 2003.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and any party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (Section 59-A-4.63 of the Zoning Ordinance). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

See Section 59-A-4.53 of the Zoning Ordinance regarding the twenty-four months' period within which the special exception granted by the Board must be exercised.

See Section 59-A-3.2 of the Zoning Ordinance regarding Use and Occupancy Permit for a Special Exception.